No. 1168

In the Supreme Court of the United States

OCTOBER TERM, 1966

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents,

and

PACIFIC MARITIME ASSOCIATION and MARINE TERMINALS CORPORATION,
Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief for Intervenors in Opposition

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I.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia, announced on December 22, 1966, is reported at 371 F. 2d 747 (D.C. Cir. 1966). The opinion of the

Federal Maritime Commission is not yet reported but is reprinted at R. 666a-728a.[1]

II.

QUESTIONS PRESENTED

The petition for certiorari seeks to present questions arising under sections 15, 16, and 17 of the Shipping Act, 1916. (46 U.S.C. §§ 814, 815, 816.) The only question presented, however, is whether the court of appeals acted in accordance with the decisions of this Court by limiting the scope of its review of the Maritime Commission's determinations to whether such determinations had a reasonable basis in law and were supported by substantial evidence.

III.

STATEMENT OF THE CASE

Intervenor Pacific Maritime Association (PMA) is a non-profit corporation whose members are the carriers, marine terminal operators and stevedore contractors comprising the Pacific Coast shipping industry. PMA bargains collectively on behalf of its members with the unions representing the offshore and shoreside employees of its members. It is also responsible for the administration and implementation on behalf of its members of the collective agreements negotiated with the various maritime unions. (R. 616a, 667a.)

The International Longshoremen's and Warehousemen's Union (ILWU) is the certified collective bargaining agent of all longshoremen and marine clerks employed on the Pacific Coast. It bargains collectively with PMA on behalf

1. The record in the court below consists of a Joint Appendix, hereinafter cited as "R." The Petition for Writ of Certiorari is hereinafter cited as "Pet."

of longshoremen and marine clerks employed by PMA members. (*Ibid.*)

Intervenor Marine Terminals Corporation (MTC) is a member of PMA who employs longshoremen and marine clerks on terms negotiated by PMA and ILWU to render stevedoring and terminal services under contracts privately negotiated by Intervenor MTC with its customers. Petitioner is one of the customers serviced by MTC. (R. 614a-16a, 667a.)

In the fall of 1960 PMA and ILWU developed a program to foster the mechanization and modernization of cargo-handling. Their agreement (Mechanization Agreement) was the fruit of collective bargaining negotiations that had commenced in 1957. (R. 618a, 668a.) ILWU agreed to permit drastic and revolutionary changes in cargo-handling to reduce overall longshore costs for the mutual benefit of the work force and the employers. (*Ibid.*)

To protect shoreside employees from the consequences of reduced employment and to share the anticipated savings produced by modernization of longshore operations, the members of PMA agreed to accumulate a twenty-nine million dollar fund over a five and one-half year term for the payment of benefits to eligible longshoremen and marine clerks. (R. 618a-19a, 668a.) To implement this agreement, PMA assessed its members who employ longshoremen and marine clerks whereby each such employer contributed to the mechanization fund on the basis of clerk-man-hours employed and the volume of tonnage handled by such employer during the contract term. (R. 622a-26a, 668a-70a.)

Because of the inability of MTC to utilize the opportunity offered by the Mechanization Agreement to modernize further and reduce its overall costs of longshore labor, the cost of longshore labor employed by Intervenor

MTC to service Petitioner increased. Therefore, Intervenor MTC requested of Petitioner an increase in its stevedore rates. (R. 627a, 669a-70a.) While Petitioner accepted the increase in labor costs resulting from the clerk-man-hour assessment, Petitioner refused to consider in its negotiations with MTC any increase in labor costs resulting from the tonnage assessment, despite the willingness of Intervenor MTC to absorb a portion of such increased labor costs. (R. 627a, 631a, 654a, 669a-71a.)

Intervenor MTC, therefore, refused to make the contributions required by the Mechanization Agreement. (R. 613a, 627a.) Pursuant to its contract obligations with ILWU Intervenor PMA filed suit in the United States District Court against Intervenor MTC, who in turn impleaded Petitioner. (R. 671a.)

Petitioner challenged as unlawful under sections 15, 16, and 17 of the Shipping Act, 1916 the assessments to which PMA members are subject by reason of the Mechanization Agreement. Petitioner asserted that PMA members, being persons subject to the Shipping Act, 1916, had entered into an unapproved "cooperative working arrangement" in violation of section 15 by their implementation of the Mechanization Agreement. Petitioner also asserted that the methods adopted for funding the plan resulted in imposition by Intervenor MTC of inequitable and disportionate charges for its services in violation of sections 16 and 17 of the Act.[2] (R. 613a-14a, 671a-72a.)

On Petitioner's motion the district court referred the questions arising under the Shipping Act to the Commission. (R. 613a, 671a.) A hearing with the production of

2. Petitioner also charged violation of the Sherman Act, but action on these charges has been held in abeyance pending resolution by the Maritime Commission of the Shipping Act issues.

testimony and exhibits resulted. After complete briefing of all issues, the Trial Examiner, on the basis of detailed findings of fact and conclusion of law (R. 611a-56a), rejected Petitioner's charges of violations of the Shipping Act, 1916.

Petitioner's conception of itself as a victim of a price-fixing conspiracy among the so-called "liner interests" of PMA was also rejected.[3] (R. 649a-51a.) The Trial Examiner found:

> [1] There is no substantial evidence to show that the actions of either the PMA membership or the Board of Directors or the Committee after January 10, 1961 was intended to do more than establish a method of assessment of the membership for contributions to the Mech Fund. . . . (R. 637a.)
>
> [2] There is no substantial evidence to show that the PMA members as such agreed among themselves how this assessment was to be treated after it was made, or that PMA issued any directions to any PMA member as to how it was to handle the assessment after it was made. . . . (R. 637a.)
>
> [3] That the January 10, 1961 agreement did not include agreement that the Mech Fund charge was to be passed on by the PMA members seems clear from the actions and events that occurred involving the Respondents and the VW charge. . . . (R. 638a.)
>
> [4] Respondents entered negotiations with Volkswagen for the establishment of a new rate wherein Respondents would absorb part of the Mech Fund. This offer Volkswagen rejected. These discussions and actions would have been so much surplusage if the January 10, 1961 agreement had provided that the Mech Fund charge was to be passed on to the customer. . . . (R. 638a-39a.)

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3. Petitioner, by innuendo at least, in its Statement of the Case continues to press this far-fetched view upon this Court, notwithstanding that its conception of the facts has been rejected.

At Petitioner's request, the Maritime Commission reviewed the Trial Examiner's decision. On relevant issues it adopted his findings of fact and affirmed his conclusions of law. With respect to the issues presented under section 15 of the Shipping Act, 1916, the Commission held that "agreements which affect only labor-management relations" are not covered by the Act, but that an "additional agreement" among PMA members "to pass on all or a portion of its assessments" must be "demonstrated" to establish an agreement within the Act. The Commission found the record "devoid of evidence showing the existence of such an additional agreement." (R. 675a.)

With respect to whether a violation of section 16 had occurred, Petitioner had admitted "that all of the relevant case law requires a showing that competitive cargo has been preferred," and that its cargo had not been "subjected to 'prejudice or disadvantage' " as compared to competitive cargoes. Hence, Petitioner had failed to establish a section 16 violation. (R. 676a.)

With respect to the section 17 issues, the Commission concluded on the basis of established principles,[4] that there is no statutory requirement that the various users of a maritime facility be charged identically "as long as 'substantial benefits' are provided" for the charges assessed. (R. 677a.) The Commission found that Petitioner secured substantial benefits from the Mechanization Agreements. (*Ibid.*) Further, the method adopted by PMA for the funding of the Mechanization Agreement was, the Commission concluded, indicated by sound business judgement, and, being modeled after the methods for collection of association dues that had been in use within the industry for many years without protest, was "reasonable." (*Ibid.*)

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4. See, *e.g.*, Evans Cooperage Co. v. Board of Comm'rs, 6 F.M.B. 415 (1961).

The court of appeals, after full consideration of the record as a whole and all arguments urged by Petitioner for reversal of the Commission's determination, in a careful and detailed opinion affirmed the Commission on all points. (371 F. 2d 747 (D.C. Cir. 1966).) Consistent with this Court's recent decision in *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607 (1966), the court of appeals recognized that deference to the Commission's expertise was required, "especially in view of the technical and specialized nature of the subject area over which it has jurisdiction." (371 F.2d at 755.)

Applying these principles, the court of appeals concluded there is "substantial evidence in the record considered as a whole" to support the Commission's decision that the PMA method for funding the Mechanization Agreement, "standing alone does not come within the provisions of Section 15" of the Act, and that despite such doubts as Petitioner's presentation may have created, the record supported "the Commission's determination that there was no additional agreement." (*Id.* at 755-56.)

After "careful consideration" of Petitioner's contentions under sections 16 and 17, the court of appeals affirmed the Commission's determinations that the method adopted by PMA for funding the Mechanization Agreement was reasonable and did not result in prejudice or descriminatory charges by MTC for its services to Petitioner. (*Id.* at 756-60.)

IV.

ARGUMENT

The recent decision of this Court in *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607 (1966) emphasized that the court of appeals, when reviewing the actions of the

Maritime Commission, are bound by the substantial evidence rule. This Court noted that whether the court of appeals would have reached the same result as the Commission is immaterial when the agency's action has a reasonable basis in law and is supported by the whole record. Thus, the "deference" accorded the Commission's decision by the court of appeals in this case was required by this Court.

The decision of the court of appeals that the determinations of the Commission have a reasonable basis in law and are supported by the record as a whole disposes of the issues raised under the Shipping Act. A substantial question for review is not presented to this Court when, as in this instance, Petitioner merely seeks review of disputed evidence and specific facts, all of which have been resolved by the Trial Examiner, Maritime Commission and court of appeals contrary to Petitioner's views.[5]

In an effort to give legal content to its Petition, Petitioner dubs the grounds of decision in *Consolo* as "conventional" and argues that reliance thereon by the court of appeals for resolution of the section 15 issues was misplaced. Petitioner asserts that questions involving the scope of section 15 are "peculiarly within the judicial competence"[6] and, therefore, Petitioner's view as to the "plain meaning"[7] of the statute should have been considered by the court of appeals de novo without "deference" to the Commission's views.

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5. NLRB v. Waterman S.S. Corp., 309 U.S. 206, 208-09 (1940); General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175, 178 (1938) *aff'd*, 305 U.S. 124 (1938); Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508, 509 (1924).

6. Pet. 18-19.

7. Pet. 12-17.

On the issues presented under sections 16 and 17, Petitioner reverses its attack by embracing the "conventional" rules circumscribing judicial review and asserting that the court of appeals erroneously affirmed the Commission's decision on grounds not invoked by it.[8] These fanciful interpretations of the proceedings below will not bear analysis.

A. The Commission's Decision Concerning the Scope of Section 15 in This Litigation Is Entitled to Deference and Accords with Established Rulings Developed Over Fifty Years and Is Required by the Legislative Policies Underlying the Shipping Act, 1916.

Among other things, section 15 of the Shipping Act, 1916, requires the filing with the Commission by "persons subject to" the Act of any and all agreements "fixing or regulating transportation rates or fares . . . controlling, regulating, preventing, or destroying competition . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement."[9] Petitioner's primary case before the Commission, as in its Petition, was that the funding method adopted by PMA for implementation of the Mechanization Agreement comprises a "cooperative working arrangement" within the meaning of section 15. The gist of Petitioner's argument has been that *all* agreements among persons subject to the Act, whatever their effect on competition, are "cooperative working arrangements" subject to filing with and approval by the Commission. No authority whatsoever has ever been presented for this bold construction of the Act.

The "plain meaning" of section 15 urged by Petitioner upon the Commission, the court of appeals, and this Court

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8. Pet. 24-27.

9. 46 U.S.C. § 814.

leads to the conclusion that the members of the shipping industry have for a generation been engaged in unlawful conduct under the Shipping Act. The members of PMA have collectively entered into agreements to form and finance their collective bargaining associations; they have agreed to the presentation of uniform bargaining programs in negotiations with the maritime union; they have collectively accepted the contracts achieved by such negotiations and have provided, through agreements reached within their associations, for the administration and implementation of their union contracts. None of these "agreements" or "undertakings" that underlie the collective conduct of their labor-management relations has ever been filed with or approved by the Maritime Commission or its predecessors. Yet all of these activities of the bargaining associations of maritime employers have indirectly affected transportation rates.

Such agreements and undertakings among the members of PMA, no less than the funding method adopted by PMA for implementation of the Mechanization Agreement, have established uniform costs for all employers of maritime labor. Indeed, the primary object of industry-wide bargaining has been to establish uniform wages, fringe benefits, and working conditions. This function of the bargaining process in the shipping industry has been common knowledge for decades.[10] No one has heretofore suggested that such collective activities engaged in by "persons subject to" the Shipping Act are "cooperative working arrangements" covered by the Act.

It is not, therefore, surprising that the Commission concluded that the Shipping Act had never been construed to cover such collective action on the part of "persons subject

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10. Maritime Labor Board, Report to the President and to the Congress (1940).

to" the Act, and that agreements which affect only labor-management relations are not "cooperative working arrangements" covered by section 15. It is surprising, however, that anyone could seriously maintain, as has Petitioner, that the Commission's view as to the scope of its jurisdiction over such matters is not entitled to deference and that the questions involved are "peculiarly within the judicial competence" to resolve.

Whether an agreement constitutes an "exclusive or preferential cooperative working arrangement" within the meaning of the Act unquestionably presents a mixed question of fact and law. The decisions of this Court clearly establish that the Congressional policy is to accord regulatory agencies broad discretion to determine such questions for themselves. *Atlantic Refining Co. v. Federal Trade Comm'n*, 381 U.S. 357, 367-68 (1965); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944); *Gray v. Powell*, 314 U.S. 402, 411-12 (1941); *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 146 (1939). Lower courts have recognized that the determinations of the Maritime Commission on such questions, no less than those of the NLRB, are entitled to great deference when construed in the light of the record and supported by a reasonable basis in law. *Alcoa S.S. Co. v. Federal Maritime Comm'n*, 321 F. 2d 756 (D.C. Cir. 1963); *Trans-Pacific Freight Conference of Japan v. Federal Maritime Comm'n*, 314 F. 2d 928 (9th Cir. 1963).[11]

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11. *E.g.*, the court in *Alcoa* held that the Commission's determination of what is

> "unjustly discriminatory or unfair." . . . obviously turns upon a determination of facts—a function committed by Congress to the Commission, an expert body whose findings in this regard are not lightly to be disregarded by a reviewing court. (321 F.2d at 759.)

The court in *Trans-Pacific* said

> we think it is within the competence of the Commission . . . to construe the words "employed by" in the light of the record which was before the Commission. (314 F.2d at 935.)

This case, moreover, presents an excellent example of why deference must be accorded the agency's determination of such questions. The legislative material[12] developed over a half century will be searched in vain for an indication that Congress has ever intended the Commission to assume jurisdiction, under the Shipping Act over the activities of the members of the industry in negotiating, administering and implementing their labor contracts. No administrative or judicial decision has ever suggested that such "agreements" or undertakings among "persons subject to" the Act are "cooperative working arrangements" within the scope of section 15.[13]

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12. See, *e.g.*, House Comm. on Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914) [Alexander Report]; Hearings on H.R. 4299 Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine and Fisheries, 87th Cong., 1st Sess. (1961); Hearings on H.R. 6775 Before the Merchant Marine and Fisheries Subcomm. of the Senate Comm. on Commerce, 87th Cong., 1st Sess. (1961) [Steamship Conference/Dual Rate Bill]; Hearings Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary, 86th Cong., 1st Sess., ser. 14 (1959); Hearings Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine and Fisheries, 86th Cong., 1st Sess. (1959) [Steamship Conference Study].

13. In such cases as have been concerned with the meaning of the term "cooperative working arrangement" as used in section 15, the rule of *ejusdem generis* has been applied to determine the content of the phrase, or it has been assumed that it was included in the Act to preclude avoidance of the regulation of the specific practices enumerated in the section by the "manner" in which the prohibited understanding was reached. See Unapproved Section 15 Agreements—North Atlantic-Spanish Trade, 7 F.M.C. 337 (1962); Unapproved Section 15 Agreements—South African Trade, 7 F.M.C. 159 (1962); Puget Sound Tug & Barge Co. v. Foss Launch & Tug Co., 7 F.M.C. 43 (1962); Unapproved Section 15 Agreements —West Coast South American Trade, 7 F.M.C. 22 (1961); Maatschappij "Zeetransport" N.V. (Oranje Line) v. Anchor Line, Ltd., 6 F.M.B. 199 (1961); American Union Transport, Inc. v. River Plate & Brazil Conferences, 5 F.M.B. 216 (1957), *aff'd*, 257 F.2d 607 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 828 (1958); Associated-Banning Co. v. Matson Nav. Co., 5 F.M.B. 432 (1958); *In re* Wharfage Charges & Practices at Boston, Mass., 2 U.S.M.C. 245 (1940).

It has long been recognized that the Act was adopted by Congress to secure the regulation and supervision of trade practices in the industry so as to foster the commerce of the United States. See *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 487-490 (1958).[14] Therefore, the statute does not include guidelines suggesting how the Commission should supervise activities concerned with maritime labor relations.[15] The Commission has not developed a staff or accumulated the experience for such a vast undertaking.

Finally, the assumption of regulatory power urged upon the Commission by Petitioner would result in serious restriction of the freedom of labor and management to bargain collectively. This Court has recently stated that "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."[16] The Commission's refusal to assume such jurisdiction, and its reliance (R. 675a) on court decisions such as *Kennedy v. Long Island R.R.*, 211 F. Supp. 478, 489 (S.D.N.Y. 1962), *aff'd.*, 319 F. 2d 366, 374 (2d cir. 1963), *cert. denied*, 375 U.S. 830 (1963), in which similar provisions of the Interstate Commerce Act (49 U.S.C. § 5(1)) were held inapplicable to agreements affecting only labor-management relations, places the Commission's decision squarely in accord with contemporary interpretations of Congressional labor policy, as distinguished from Congressional policies

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14. PMA is not a rate-making conference and no one has asserted otherwise. (R. 128a, 179a.)

15. Petitioner's reliance (Pet. p. 20) on decisions of the Civil Aeronautics Board for a contrary result are misplaced since the Federal Aviation Act, unlike the Shipping Act, 1916, directs the CAB to promote the policies of the Railway Labor Act which governs labor relations in the airline industry. (49 U.S.C. § 1371 (K)(4).)

16. NLRB v. Insurance Agents' Int'l, 361 U.S. 477, 488-90 (1960).

regarding transportation or trade practices.[17] Surely, deference must be accorded the Commission's view that expansion of its jurisdiction to cover collective actions implementing labor contracts and policies *cannot* be justified under the Shipping Act, 1916, which was derived from the Interstate Commerce Act and designed to secure governmental supervision over restrictive trade practices in the shipping industry. See *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 484-85 (1932).

In an attempt to undermine the respect to which the Maritime Commission's views (like those of other agencies) are entitled, Petitioner complains that the Commission restricted the coverage of section 15 to only those agreements between parties in direct competition with each other. (Pet. pp. 13-14.) The Commission, on the contrary, recognized that the section applies to all agreements involving trade practices that affect competition regardless of whether the participants are vying with each other for the patronage of another person.

The Commission's recognition of this principle (R. 673a-74a) is demonstrated by its citation of *D. J. Roach, Inc. v. Albany Port Dist.*, 5 F.M.B. 333, 335 (1957), where the predecessor agency noted the applicability of section 15 to a lease between the owner of terminal premises and the operator thereof. Obviously the owner and operator are *not* in direct competition for the patronage of the users of a marine terminal.

The Commission's refusal, in the end, to classify agreements fixing uniform and common labor costs for members of an industry as agreements involving trade practices affecting competition is not unique. Petitioner's mistaken

17. See *ibid.*

view that competition is unlawfully restricted by such agreements because "wages always affect prices" (Pet. pp. 14-17) was rejected by Congress during the intense debates occasioned by the Taft-Hartley Act.[18] The activities of multiple-employer groups in establishing uniform labor costs for an industry were not considered as frustrating the national policies furthering competition. It is now accepted that effectuation of the national labor policies is assisted by activities of multiple-employer bargaining groups. See *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 94-96 (1957).

Finally, Petitioner's suggestion that the decisions below will permit "anti-competitive arrangements" to escape "governmental scrutiny" is nonsense. The "cooperative working arrangements" described in the Commission's Annual Report for 1966 are unaffected by this litigation. None of these arrangements involve "agreements" or "undertakings" by the members of the industry to establish uniform labor costs. Nor is the action of the PMA membership in implementing the Mechanization Agreement free from "governmental scrutiny" merely because it is not a "cooperative working arrangement" within section 15. Many decisions of this Court make clear that the Sherman Act prevents employers and labor unions from engaging in monopolistic and anti-competitive practices under the guise of managing their labor-management relations.[19] While we deny that the members of PMA have so conducted their

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18. See 93 Cong. Rec. 5144 (May 12, 1947).

19. See, *e.g.*, United States v. Women's Sportswear Ass'n, 336 U.S. 460, 463 (1949); United Brotherhood, Carpenters & Joiners v. United States, 330 U.S. 395, 400 (1947); Allen-Bradley Co. v. Local 3, Electrical Workers, 325 U.S. 797 (1945); Cox, *Labor and Anti-Trust Laws—a Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 255 (1955).

affairs, the federal court provides a forum for scrutiny of their activities and effective remedies if Petitioner can establish such unlawful conduct.[20] The Commission properly refused to assert its jurisdiction over causes arising under the Sherman Act.[21]

B. The Questions Raised Under Sections 16 and 17 of the Act Involve Technical Issues Within the Peculiar Competence of the Commission, and the Basis for Its Decision Was Affirmed by the Court of Appeals on Its Review of the Whole Record.

Petitioner recognizes that questions respecting "undue or unreasonable preference" and "unreasonable prejudice or disadvantage" under section 16, and the enforcement of "just and reasonable regulations and practices" under section 17, are peculiarly within the Commission's competence to resolve. (Pet. 27.) To undermine the court of appeal's affirmance of the Commission's determinations on these questions, Petitioner asserts that the court below affirmed the Commission on grounds not invoked by it. (Pet. 24-27.) A comparison of the court's decision with the Commission's on these questions does not support this charge. The Commission and court alike rejected Petitioner's suit on these questions because, contrary to Petitioner's allegations, "substantial benefits" resulted from the Mechanization Agreement, and the allocation of the labor costs incurred thereunder was reasonable since it was supported by "necessary" business considerations, and followed the method by which Association dues had been levied for years without challenge.[22]

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20. See *ibid.*

21. See 15 U.S.C. § 4; *cf.* Minneapolis & St. L. Ry. Co. v. United States, 361 U.S. 173, 186 (1959); McLean Trucking Co. v. United States, 321 U.S. 67, 85-86 (1944).

22. *Compare,* Commission's decision (R. 68a-69a, 677a-78a) *with* court's decision. (371 F.2d 747, 758-60.)

Moreover, the court below additionally gave "careful consideration" (371 F.2d at 756) to each of the arguments presented by Petitioner for reversal of the Commission. These arguments were, as the court below recognized (*Id.* at 757), derived from the views of Commissioner Patterson, sole dissenter from the Commission's determinations under sections 16 and 17. Petitioner reargued in the court below theories that the Commission had refused to adopt.

Petitioner now complains because the court below, instead of limiting its review to whether the record supported the Commission's determination, also carefully considered the dissenter's views and, like the Commission, was unpursuaded. (*Id.* at 756-58.) We do not doubt that if the court below had refrained from this consideration, Petitioner would now complain that the court below had improperly restricted its review. The court below, however, cannot now be faulted for having reviewed and rejected the views of the dissenting Commissioner while at the same time it affirmed on the basis of the whole record the determinations of the majority of the Commission.

The Commission, of course, did not hold that section 17 was violated only when "improper motivation" had been established, as Petitioner now asserts. (Pet. 23.) The Commission merely observed that a charge otherwise lawful would not be sustained, if there was a "design deliberately" to burden one user of a maritime facility more than another. This observation was not inappropriate in view of Petitioner's persistent but unproven[23] allegations that it was the victim of "deliberate design" on the part of the "liner interests" of PMA to shift their labor costs to Petitioner.

Nor was it improper for the court of appeals to refrain from considering Petitioner's arguments under *New York*

23. See Initial Decision of Examiner, R. 649a.

Foreign Freight Forwarders & Brokers Ass'n v. Federal Maritime Comm'n, 337 F.2d 289 (2d Cir. 1964), *cert. denied*, 380 U.S. 910 (1965). Petitioner had not only conceded before the Commission that the legal authorities under section 16 required the showing of preferences as to competitive cargoes (R. 676a), but also had failed to establish the applicability of the *Freight Forwarders* case, which is dependent upon showing that "random" charges are being made for identical services. (337 F.2d at 299.) In view of the Court's affirmance of the Commission's determination that the charges were "reasonable," the *Freight Forwarders* case was irrelevant.[24]

V.

CONCLUSION

Unquestionably, the Mechanization Agreement required the collection of a substantial sum of money for the payment of important employee benefits. Unquestionably, all persons interested in the operations of the Pacific Coast shipping industry were affected, directly or indirectly, by this sweeping labor program. These are not, however, adequate reasons for the granting of Certiorari. The costs of the Mechanization Agreement are an insignificant fraction of the entire cost of longshore labor during the five and one-half year term of the initial Mechanization Agreement. Despite the effect of the Agreement for everyone involved

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24. It should be obvious that the services rendered by stevedore contractors in handling one cargo (such as automobiles) are *never* identical with services involving other cargoes, such as cotton, canned goods, or locomotives. Petitioner obscures this truism when it invokes Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 303 (1937). (Pet. 21.) The Mechanization Agreement was not designed to establish rates for "identical services" and "facilities." It provides a means of permitting efficient use of dock workers by their employers and fixes one cost of shoreside labor. (371 F.2d at 758.)

with the operations of the industry, only Petitioner has complained. Significantly, the Army, probably the single largest shipper employing the facilities of the industry and required to employ commercial stevedore contractors covered by the Agreement, has not during the pendency of this litigation found any reason for joining Petitioner in its challenge to the Agreement and its implementation by the PMA membership. Yet the Army's interest in requiring strict observance of the laws regulating the industry far outweighs those of Petitioner.

We respectfully submit that the careful review of the Maritime Commission by the court of appeals, in accordance with the mandate of the *Consolo* decision, deserves the respect of this Court, and the Petition for Writ of Certiorari should be denied.

Dated: April 14, 1967.

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